

Before the
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

ORIGINAL

In the Matter of)
)
Implementation of Section 703(e))
of the Telecommunications Act)
of 1996)
)
Amendment of the Commission's)
Rules and Policies Governing)
Pole Attachments)

CS Docket No. 97-151

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REPLY COMMENTS OF THE ELECTRIC UTILITIES COALITION

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October 21, 1997

No. of Copies rec'd 0+6
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Table of Contents

Table of Contents	i
Executive Summary	ii
I. IDENTIFYING AND CALCULATING ATTACHING ENTITIES	2
II. OVERLASHING	3
III. CONDUIT RENTAL RATES	6
IV. RIGHTS-OF-WAY	11
V. TRANSMISSION RIGHT-OF-WAY	13
VI. MISCELLANEOUS	14
A. <u>Application of Differential Rates under Sections 224(d) and 224(e)</u>	14
B. <u>Wireless "Attachments"</u>	17
C. <u>Access to Cable Company Conduits</u>	18
D. <u>Participation in Ride-Outs</u>	20
E. <u>No Requirement of Uniform or Identical Rates, Terms or Conditions</u>	21
VII. CONCLUSION	21

Executive Summary

The Electric Utilities request that the Commission recognize Congressional intent to foster level playing field competition in all facets of the telecommunications industry and enact rules that remove the special subsidy enjoyed by the cable companies in their use of utility plant, paid for by consumers of electric utility service. Electric utilities should be able to use system averages for the number of attaching entities, and not be burdened by presumptive numbers created solely in order to continue the subsidy. The Commission should also ensure that utilities are fully compensated for the use of their poles, and that attachers may not unjustly enrich themselves by subleasing overhead space. Overlapping should proceed only after notice has been provided, and permit and non-recurring charge provisions are satisfied.

The Electric Utilities should also be fully compensated for the use of their conduits. Conduit costs should be allocated on the basis of replacement costs and should be calculated on the basis of actual run-to-run conduit occupation, if elected by the utility. The rates, terms and conditions of attachment to rights-of-way should proceed on a case-by-case basis. Except under unusual situations, transmission towers are not usable for aerial attachments. Due to the existence of counterpoise and clearance margins, only the certain portions of transmission rights-of-way on either side of towers is available for burying attachments. The charges for rights of way and transmission tower right of way access should both be based on the current fair market value of such property rights, as such right of way is not depreciated or depreciable, and only such valuation fully compensates the utility and ensures a level playing field.

Section 224 does not apply to the non-wireline equipment of wireless providers, and the instant proceeding is not the forum for addressing the market entry and competitive efforts of wireless services. The Commission should recognize that cable service providers must provide

non-discriminatory access to their ducts and rights-of-way used for cable services in certain circumstances, and provide access in all instances when such ducts and rights-of-way are used for telecommunications services. All attachers should be required to fully participate in surveys, counts and other field activities, and be barred from instigating complaint proceedings when they fail to participate. The Commission should emphasize that arm's-length, good-faith negotiated agreements should be the normal mechanism for determining the rates, terms and conditions of attachment. The Commission should reject tariff-like uniform-rate or identical-term regime.

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In the Matter of)	
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Implementation of Section 703(e) of the Telecommunications Act of 1996)	CS Docket No. 97-151
)	
Amendment of the Commission's Rules and Policies Governing Pole Attachments)	

TO: The Commission

REPLY COMMENTS OF THE ELECTRIC UTILITY COALITION

Carolina Power & Light Company, Delmarva Power & Light Company, Atlantic City Electric Company, Entergy Services, Florida Power Corporation, Pacific Gas and Electric Company, Potomac Electric Power Company, Public Service Company of Colorado, Southern Company, Georgia Power, Alabama Power, Gulf Power, Mississippi Power, Savannah Electric, Tampa Electric Company, and Virginia Power, including North Carolina Power, (each an "Electric Utility," collectively, "Electric Utilities"), by their attorneys, hereby file their Reply Comments in response to the Comments filed pursuant to the July 1, 1997, Notice of Proposed Rule Making ("NPRM") issued by the Federal Communications Commission ("FCC" or "Commission") in CS Docket No. 97-151.¹ As with their Comments filed earlier in this docket ("Phase II Comments"), the Electric Utilities again note that they have provided extensive filings in CS Docket No. 97-98 ("Initial Comments" and "Reply Comments," collectively "Phase I

1. Pursuant to the NPRM and the Order issued by the Commission in the proceeding on October 10, 1997, these Reply Comments are timely filed.

Comments") which, in accordance with the Commission's edict,² the Electric Utilities incorporate herein by reference and which these Reply Comments cite but do not restate in detail.

I. IDENTIFYING AND CALCULATING ATTACHING ENTITIES

In their Phase II Comments, the Electric Utilities posited that only cable systems or telecommunications service providers may be included in the allocation of the two-thirds of unusable space on a pole or in a conduit pursuant to Section 224(e)(2),³ and that for purposes of making the allocation among such attachers, the key inquiry is the number of such entities attached, including third-party overlashers.⁴ This position, aside from its treatment of overlashers, garnered significant support from a large majority of the commenters who addressed this issue.⁵

To make the actual allocation, therefore, the number of entities attached to a utility's poles must be identified. The Electric Utilities reiterate their support for the Commission's proposal that each utility be permitted to develop a presumptive average number of attaching

2. NPRM at para. 8.

3. 47 U.S.C. § 224(e)(2).

4. Phase II Comments at 4-12; *see also infra* Section II.

5. Comments of GTE Service Corporation at 2 ("GTE Comments"); Comments of Ohio Edison Company at 36; Comments of U S West at 6 ("U S West Comments"); Comments of Dayton Power and Light at 2; Comments of Bell Atlantic at 5-6 ("Bell Atlantic Comments"); Comments of New York State Investor-Owned Electric Utilities at 5; Comments of ICG Communications, Inc. at 32; Comments of Comcast Corp., et al. at 6 ("Comcast Comments"); Comments of American Electric Power Service Corp., et al., at 21 ("AEP Comments"); Joint Comments of the Edison Electric Institute and UTC, the Telecommunications Association at 19-20 ("EEI/UTC Comments").

entities on the utility's poles.⁶ The Electric Utilities posit that the Commission should, for these purposes, permit each utility to calculate the average number of attachers for its system. Furthermore, the Electric Utilities assert that the Commission should permit each utility to adopt different categories of poles within its system -- provided the information for doing so is available and the poles are broken down along reasonable lines -- and develop an average number of attachers per category of poles.⁷ The Electric Utilities urge the Commission to reject the idea of developing a presumptive average number of attaching entities for purposes of allocating the two-thirds of other than usable space and to specifically reject Comcast's proposed average number of six attaching entities for urban poles and three for rural poles.⁸

II. OVERLASHING

The comments filed in this docket indicate that substantial misconceptions regarding overlashing persist. Most importantly, it is simply not the case that overlashing has no effect

6. Phase II Comments at 7 (*citing* NPRM at para. 26).

7. For example, a utility should be permitted to subdivide the poles in its system between poles thirty feet and under and poles greater than thirty feet and to calculate the average number of attachers for each type of pole. *Accord*, EEI/UTC Comments at 24; Comments of Sprint Local Telephone Companies on Specific Questions, at 3. The Electric Utilities concur with Sprint's suggestion that, if a utility engages in such categorized averaging, the utility should provide attachers with the methodology and information used to calculate the average number of attachers in each category.

8. Comcast Comments at 8. The Electric Utilities note in this regard that the study relied upon by Comcast, the FEDERAL COMMUNICATIONS COMMISSION 1996 FIBER DEPLOYMENT UPDATE, in no way supports Comcast's proposal that the Commission adopt a presumed average of six attaching entities for urban poles and three for rural poles. Comcast's argument deliberately ignores the caveats to the study regarding its inaccuracies, as well as the extent to which reselling is encompassed but not separately reported. The report had nothing to with attachments, and includes installations which are made without the use of any utility right-of-way. Furthermore, there is no way to glean from the report whether multiple attachments, if any, occur over the same right-of-way, or merely within the same MSA. Comcast's reliance on the study should be specifically rejected.

on utility poles. As demonstrated in the Electric Utilities' Phase I Comments, overlashing has a significant effect on both sag and the stress placed on poles.⁹ These effects impact utility pole infrastructure in two key ways relevant to determining attachment rental rates. Additional sag caused by overlashing results in additional vertical space being required in order for cables to meet mid-span separation requirements.¹⁰ In order to provide this additional space, attachments must be placed further apart on poles. Furthermore, the additional stress imposed upon utility poles due to the extra weight of overlashed cable(s) requires additional guying or other pole-strengthening measures or, ultimately, replacement with poles of greater strength (lower class). It is imperative, therefore, both that pole owners be apprised of overlashing and that entities who overlash pay their fair share of the costs resulting from overlashing.

Therefore, the Electric Utilities reiterate that the Commission must require attachers who wish to overlash their own cables or those owned by others to take several key steps. First, attachers must provide pole owners with advance notice of overlashing, and overlashing should commence only upon the issuance of a permit by the pole owner. Second, overlashers should pay any make-ready necessary to accommodate the additional vertical space or pole-support necessitated by the presence of overlashed cable, including the cost of replacing any poles that are not strong enough to accommodate the additional weight with poles that are. Finally, overlashers should be required to pay just and reasonable rent for their attachments.

As to this last, the rental rate for overlashed attachments, the Electric Companies believe that the presumptive maximum just and reasonable rate should be established as a ceiling, with the expectation that a negotiated rate below the ceiling will be charged. Even if the Commission

9. See Reply Comments at 18-25; see also Initial Comments at 36 n.51.

10. *Id.*

does not require attachers who overlash their own cables to pay fees above and beyond the make ready costs necessitated by overlashing,¹¹ the Commission must require third-party overlashers to pay rental fees at a just and reasonable rate.¹² If third-party overlashers are not required to pay rent to pole owners, the attachers whose cables the third-parties overlash will be unjustly enriched by income that should flow to pole owners, and the cost of the overlashed entities' pole attachments will be unfairly subsidized. As the Electric Utilities noted in their Phase I Comments, the amendments to Section 224, and the 1996 Act generally,¹³ were adopted to foster true competition in the provision of telecommunications services.¹⁴ Such competition cannot flourish where the government provides or encourages subsidies for some of the market participants.¹⁵

11. If the Commission declines to treat overlashing by cable companies of their own facilities as additional, separate attachments, the Commission should explicitly establish that, where the overlashed cable is one for providing telecommunications services, the cable company's rental rate for those attachments will be that dictated by Section 224(e) rather than 224(d), as their attachment will have been converted to one used for providing telecommunications services. *See also infra*, Section IV.A.

12. The Electric Utilities urge the Commission to treat the subsidiaries of a cable company already attached to utility poles as third parties for the purposes of overlashing.

13. Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, as codified at 47 U.S.C. § 151, et seq. ("1996 Act").

14. *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket No. 96-98, First Report and Order, 11 FCC Rcd 15499 at para. 1 (1996) ("First Report and Order").

15. That the failure of the Commission to require rental payments for, at least, third-party attachments would result in unfair competitive advantages to cable companies can be illustrated by the following example. Situations have arisen where a rural electric cooperative, whose poles are exempt from the pole attachment provisions of the Act, *see* 47 U.S.C. § 224(a), permits a cable company to attach to its poles for a fee well below the market or formula rate, in exchange for the right to overlash the cable company's attachments on non-exempt utility poles with the rural electric cooperative's telecommunications subsidiary's cables. By doing so,
(continued...)

III. CONDUIT RENTAL RATES

The Electric Utilities refrained from presenting a formula for calculating conduit pricing for telecommunications attachments after 2001. After reviewing the comments filed in this docket, it appears that substantial confusion persists regarding the concept of usable versus unusable space in conduits. These concepts are particularly difficult due to the difficulty of visualizing conduit, and an inability to analogize usable and unusable space on poles to usable and unusable space in the conduit context. In order to assist in understanding ducts and conduit,¹⁶ the Electric Utilities have attached, as Exhibit A, a diagram of a typical six-duct conduit, in which three of the ducts are being used by the electric utility, one duct is a spare, one has been demonstrated to be usable and one has been demonstrated to be collapsed. *See infra* at 8.

The construction of conduit typically requires a number of steps prior to the installation of the ducts, including but not limited to obtaining permits, excavating rock, shoring trench sides, and treating trench subsurfaces. Once the conduit space has been prepared, the ducts are laid in place and then covered with a layer of thermal sand and/or concrete encasement. The space is filled with dirt or other fill, and asphalt or landscape is placed over the excavation.

As is apparent from the diagram, conduit is conceptually much different from poles. The usable space on poles is evident even from a casual inspection -- all of the space above the

15. (...continued)

the rural electric cooperative avoids paying the formula rate, the market rate, or any rental for its telecommunications subsidiary's infrastructure, plus the cooperative pockets a tidy little sum for the cable company's attachments. Other competitive telecommunications providers (and utilities) do not have this opportunity and suffer a competitive disadvantage.

16. The Electric Utilities have previously stated that the proper terminology is to refer to each through path as a duct, and the combination of multiple ducts as either a duct bank or conduit. The Electric Utilities will continue with this use of terminology in this discussion.

minimum ground clearance level for horizontal cable attachments and the safety zone is normally usable. It is easy to examine a pole and see that a certain number of feet are in the ground, several feet are needed for ground clearance, and other space is occupied by attachments. Due to the relationship between poles, the earth, and the need for lines to be held up, the function of each foot of the pole is clear.

Visualizing conduit space is much more difficult. There is no clear delineation of the exact amount of space that is usable, and there has been no convention for determining usable space which is akin to the "one foot" convention for poles. While some unusable parts of a pole clearly exist solely to make other parts of the pole usable -- for example, the part buried in the ground makes the rest of the pole stand up, and the part between the ground and the lowest attachment level for horizontally attached cables and equipment places them out of harm's way -- it is less clear in the context of conduits which parts of the system perform such "support" functions. In fact, the depth of the trench, the concrete backfills, and other unique but expensive features of conduit exist solely to protect and make useful the one usable part of a conduit system -- that is, the ducts themselves.¹⁷

Furthermore, the apparent existence of a duct as observed from a manhole does not mean that the duct is or can be made "usable" as that term is defined in Section 224. Individual ducts within a conduit system are often collapsed, which can occur during the construction of conduit or at any time thereafter. Ducts are often also cut or collapsed during subsequent trenching or digging by third parties, even when encased in concrete. Many ducts become clogged or occupied by failed cable, rendering any number of ducts as unusable as the non-duct portions

17. It is clearly not the case, therefore, as commenters such as AT&T argue, that no conduit space is unused. *See, e.g.*, Comments of AT&T Corp. at 16 ("AT&T Comments").

of the conduit. Although it may not be apparent, most manhole systems are typically filled with water, even when occupied with energized electric cable -- a factor in the engineering of electric conduit systems. The constant filling and draining of water, however, persistently affects the usable nature of ducts. As a consequence, even when empty ducts are visible there is no assurance that any of the ducts can be used.

Due to the nature of ducts, the Electric Utilities must engage in a common practice of examining the system and "rodding out" any duct proposed to be used.¹⁸ As shown in Exhibit B attached hereto, conduit systems consist of a number of straight or slightly curved "runs," which are connected together with manholes or other access nodes. The length of each run can vary from anywhere between a minimum of 150 feet and a maximum of 400 to 600 feet,¹⁹ the maximum distances being limited by sidewall pressures, equipment limitations, and the inability to pull cable through longer lengths due to friction and the tensile strength of cable. The manholes and access nodes serve as both splicing points between cable runs, and maintenance ports in the system.

18. Rodding must be scheduled in advance by the utility and is directly invoiced to the attaching entity as a non-recurring cost. Moreover, rodding is extremely time-consuming work requiring significant preliminary and ancillary measures, which can include, without limitation:

- establishing and maintaining traffic control
- pumping water out of manholes and conduits
- testing conduits for gasses
- establishing and maintaining ventilation
- blanketing existing cables for safety purposes
- clearing manholes, conduits and ducts of dirt

After all the above is accomplished or established, the actual rodding of the selected ducts, by the installation of pulling lines, can commence.

19. The wide disparity in the length of these runs reflects the differences between the shorter distances typically found in urban conduit and the longer distances more typical of rural or suburban conduit.

When approached with a request for access to a duct, the electric utility must go to each manhole or access node and run a length of "snake" from each manhole to the next through the runs requested by the attaching entity. Only by rodding each run can the Electric Utility determine if there is a through duct which can be used for attachment. While this is obviously more complicated than the visual inspection of poles which must take place prior to pole attachment, it actually makes the calculation of a maximum rate of attachment somewhat easier and more exact.

As the Electric Utility must make a run-by-run inspection prior to any attacher making an attachment, the Electric Utility knows the number of attachers in each run. In addition, depending upon the number of ducts actually in use or rodded out, it also knows how many usable ducts are in place.²⁰ The electric utility should be able, in most instances, to recalculate the attachment rate on a run by run basis with the entry of each new attacher, so that each attacher pays its proportionate costs of usable and non-usable space. Similarly, due to the run-by-run calculation, there is no need for a half- or quarter-duct convention, as all of the duct runs can be recalculated each time a new attacher comes into the conduit bank.²¹ If interduct is run for the new attacher, the electric utility can recalculate the rate paid by the previous attacher.

20. The Electric Utilities suggest that the Commission establish that attachment calculations be based solely on the ducts in use or demonstrated to be usable by rodding. If an attacher is willing to pay the incremental additional cost of rodding the remaining ducts in the conduit bank, the Electric Utilities would be willing to take into account those additional usable ducts in making its length-by-length calculation.

21. The Commission should also reject the suggestion that "spare" duct is usable to the Electric Utilities. The redundancy of a "spare" duct provides disaster recovery to all attachers. It should therefore be considered unusable space, because of its reserve nature. Should "spare" ducts be considered usable space for the conduit owner, then attachers should be prohibited from ever using those ducts.

As a consequence, it is easier to make the usable/non-usable determination as to conduits, and to calculate conduit attachment rates, than it is with pole attachment rates. As the Electric Utilities demonstrated in its Phase I Comments and in its Phase II Comments, costs related to conduit are not kept in FERC accounts in a manner that would permit their use for setting an attachment formula.²² The most reasonable and easiest manner useful in determining conduit costs for attachment pricing is current replacement costs.

Using current replacement costs makes the determination of the costs of usable versus unusable space extremely easy. The usable space in a conduit is the cost of the actual duct itself. In order to price duct, it is very easy to determine current retail costs of the ducting. The duct is clearly the only part that is usable -- the ditch, concrete and surrounding materials all exist solely to support and protect the duct which houses cables and wires. The cost of the ducts, being the usable space, can then be deducted from the total cost of the conduit, on a per-foot basis, to complete the calculation of the maximum rate under the statute.

It bears note that electric utility conduit networks consists of two significantly different types of systems. The common terminology for the two types of systems in a conduit network are Direct Buried Systems, which are commonly "suburban" systems, and Manhole Conduit Systems, which are commonly "urban" systems. These systems are constructed differently, and the costs of constructing each type of system differ significantly. The Electric Utilities propose, in light of the fact that run-by-run rate calculations can be made, that the rates for each type of system be calculated separately, at the option of the electric utility.

IV. RIGHTS-OF-WAY

22. As pole attachment rates had never applied to conduits in the past, and the opening of conduits for attachment is a fairly recent trend, the Electric Utilities have had no reason to accumulate segregated conduit costs that would be useful in setting any formula.

The Electric Utilities request that the Commission use the opportunity provided by the instant proceeding to illuminate the contours of the limiting language "own or control" included in Section 224(f). The Electric Utilities believe that the Commission should follow its initial instinct, as voiced in the Interconnection Order, that rates, terms and conditions of attachment to rights-of-way should proceed on a case-by-case basis. The Electric Utilities therefore agree with the position taken in the Comments filed by GTE,²³ Ameritech,²⁴ U S West,²⁵ Bell Atlantic,²⁶ Southwestern Bell Telephone Company,²⁷ the National Cable Television Association,²⁸ AEP,²⁹ and EEI/UTC,³⁰ and particularly with those commenters that stress that private negotiation should be the cornerstone of attachments to rights-of-way.³¹ The Electric Utilities note that commenters such as Teligent, L.L.C., who suggest that the Commission should develop a rights-of-way methodology,³² stake out a position for the

23. GTE Comments at 14.

24. Initial Comments of Ameritech at 15 ("Ameritech Comments").

25. U S West Comments at 11.

26. Bell Atlantic Comments at 9.

27. SWBT Comments at 34.

28. Comments of the National Cable Television Association at 27 ("NCTA Comments").

29. AEP Comments at 64.

30. EEI/UTC Comments at 30.

31. *See, e.g.*, GTE Comments at 14.

32. Comments of Teligent, L.L.C., at 10-14 ("Teligent Comments").

Commission to take, but provide no meaningful mechanism for implementation given the myriad, varying factors that such an undertaking would entail.³³

The Electric Utilities therefore agree that the Commission should reaffirm the decision it reached in the Interconnection Order. The Electric Utilities assert, however, that the Commission should elucidate its decision to prevent overreaching by the attachers and putative attachers commenting in this proceeding.

In the Interconnection Order, the Commission appears to adopt a case-by-case approach in assessing requests for access to rights-of-way in its statement that:

The scope of a utility's ownership or control of an easement or right-of-way[, the touchstone for mandated access under section 224(f),] is a matter of state law. We cannot structure general access requirements where the resolution of conflicting claims as to a utility's control or ownership depends upon variables[.]³⁴

The Commission further states that:

[T]he access obligations of section 224(f) apply [only] when, as a matter of state law, the utility owns or controls the right-of-way *to the extent necessary to permit such access*.³⁵

From this statement, it is clear that the central idea the Commission is communicating is that, in the context of rights-of-way, a utility cannot convey or provide to a putative attacher more than the utility possesses. In reaching this decision, the Commission expressly recognized some

33. The Electric Utilities also note that Teligent's position, which it alone takes, that rights-of-way are "essential facilities" is fallacious. Teligent Comments at 2-6. Rights-of-way are no more "essential facilities" than are electric utility poles and conduits, *see* Reply Comments at 6-7 (discussing essential facilities doctrine), for much the same reason: attachers can, in an economically feasible manner, obtain private rights-of-way of their own through negotiation with the owners of the servient estate.

34. Interconnection Order at para. 1179 (*citing* S. Rep. No. 580, 95th Cong., 1st Sess. 16 (1977) (footnotes omitted)).

35. *Id.* (emphasis added).

of the types of state law restrictions that may effect a utility's ability to provide access to rights-of-way.³⁶ The Commission should use the occasion of its ultimate Order in this proceeding to reiterate this pronouncement as clearly and explicitly as possible, lest there be any confusion in the future.³⁷

V. TRANSMISSION RIGHT-OF-WAY

In their Reply Comments, the Electric Utilities demonstrated that, except under unusual situations, transmission towers are not usable for aerial attachments. It is possible, however, for attachers to bury lines in the rights-of-way attendant to the transmission towers, when such rights-of-way are available for the burying of non-electric lines. The Electric Utilities have attached, as Exhibit C, a diagram of a typical transmission system showing the various salient features and usable space.

Transmission tower design requires the installation of special safety features called "counter poise" to ensure proper grounding. Counter poise is an underground wiring platform or harness buried under the footings of transmission towers and extended to the outside of the transmission tower footings. Trenching cannot be made through the counter poise area without disrupting the grounding system for the towers. Due to the existence of counter poise and safety

36. Interconnection Order at para. 1180 (*citing TCI, Inc., v. Schlrock Holding Co.*, 11 F.3d 812 (8th Cir. 1993); *Media Gen. Cable, Inc. v. Sequoyah Condo. Council of Co-Owners*, 991 F.2d 1169 (4th Cir. 1993); *Cable Holdings, Inc. v. McNeil Real Estate Fund VI, Ltd.*, 953 F.2d 600 (11th Cir.), *cert. denied*, 506 U.S. 862 (1992); *Cable Investments, Inc. v. Woolley*, 867 F.2d 151 (3rd Cir. 1989).

37. As an ancillary matter, the Commission should also require attachers seeking access to private rights-of-way to contact the property owner, before or upon notifying the utility holding the right-of-way, to obtain the property owner's assent to the additional burden to the right-of-way.

clearance margins, generally only the outside ten feet (10') of right-of-way on either side is available for trenching attachment.

The Electric Utilities propose using a system analogous to the conduit calculation for setting the presumptive maximum rate of attachment to transmission rights-of-way. The total usable space in the example provided is only twenty feet, and the unusable space is 180 feet. Not only is the 180 feet unusable, but it benefits all parties because the right-of-way would not exist but for the presence of the transmission towers and right-of-way. As demonstrated in earlier comments filed by the Electric Utilities, current market replacement cost is the only basis which can be used for compensation for access to transmission rights-of-way. This property does not depreciate, and where the attachers get the benefit of depreciation on poles, they should have to contribute to the appreciation of tower rights-of-way, especially as the existence of attachments creates new costs and limits the further usefulness of the right-of-way to the electric utility. Accordingly, as demonstrated by Exhibit C, the outer ten-foot zone would be usable space, and the remainder of the right-of-way would be unusable space for calculation of the presumptive maximum just and reasonable rental rate for transmission rights-of-way.

VI. MISCELLANEOUS

A. Application of Differential Rates under Sections 224(d) and 224(e)

Sections 224(d) and 224(e) require the Commission to implement two separate pole attachment rental rate schemes.³⁸ The rate established by Section 224(d) applies to cable and telecommunications attachers until February 8, 2001,³⁹ at which time the rate established by

38. 47 U.S.C. § 224(d)-(e).

39. 47 U.S.C. § 224(d)(3), (e)(4).

Section 224(e) applies to telecommunications attachers,⁴⁰ while the rate established by Section 224(d) continues to apply to attachers providing solely cable service.⁴¹ There are thus two triggering mechanisms that result in attachers providing telecommunications services paying the rate established by Section 224(e). The first is surpassingly easy to determine: at one past midnight on February 8, 2001, the rate established pursuant to Section 224(e) will apply to all attachments used to provide telecommunications services.⁴² The second, the point at which an attacher is considered to be "providing telecommunications services,"⁴³ is a point of significant contention in the comments filed in this docket.

In the interests of consistency and the creation of a level playing field, the Electric Utilities submit that an attacher be deemed to be "providing telecommunications services" in the same way that a utility's poles, ducts, conduits, or rights-of-way are deemed to be "used . . . for wire communications."⁴⁴ Any time any section or portion of an attacher's wire -- or its grouped or overlashed wires -- are used to "provide telecommunications services"⁴⁵ rather than "solely to provide cable services,"⁴⁶ the whole of that attacher's wires should be deemed subject to the rate established pursuant to Section 224(e). The suggestion of NCTA and others

40. 47 U.S.C. § 224(e)(1)-(3).

41. 47 U.S.C. § 224(d)(3).

42. 47 U.S.C. § 224(d)(3), (e)(4).

43. 47 U.S.C. § 224(e)(1) (subsection requires promulgation of regulations "to govern the charges for pole attachments used by telecommunications carriers *to provide telecommunications services*") (emphasis added).

44. 47 U.S.C. § 224(a)(1).

45. 47 U.S.C. § 224(e)(1).

46. 47 U.S.C. § 224(d)(3).

that an attacher's wires can and should be subdivided such that only certain poles to which a wire providing telecommunications services is attached are deemed to be in use for "providing telecommunications services"⁴⁷ is unworkable and inequitable.

Attempts to demonstrate or discern which sections of some wires are providing solely cable services and which are providing telecommunications services, or to establish some sort of proportionate divided usage, is entirely facetious. Moreover, such regulation along these lines would create an administrative nightmare for the Commission and for utilities and would be subject to manipulation by cable attachers. The Commission and the Electric Utilities would have to somehow determine which portions or segments of an attacher's wires are used for the telecommunications aspect of the attacher's services. Alternatively, the Commission and the Electric Utilities would have to determine which end users served by an attacher's wire are receiving what type of service.⁴⁸ This burden should not be placed on the Commission or the Electric Utilities. The rule the Commission adopts should be straightforward and easy to apply: if an attacher modifies its system to provide telecommunications services, the attacher must pay the rate established pursuant to Section 224(e).⁴⁹

47. NCTA Comments at 24; Comcast Comments at 12; Comments of Adelphia Communications Corp., et al., at 9-10.

48. The Electric Utilities note that they are already experiencing significant difficulties with cable companies reporting or seeking authorization for attachments. The scheme proposed by NCTA would result only in a proliferation of the number of pole attachment complaints brought before the Commission.

49. By taking this position, the Electric Utilities do not mean to suggest that, where an entity attaches multiple wires to a utility's poles and some are used solely for cable service, the Section 224(e) rate applies. If an attacher in fact uses distinct and separate wires for providing distinct and separate cable telecommunications services, the Section 224(d) rate would apply to the attachments of the solely cable wire, while the Section 224(e) rate would apply to the attachments of the telecommunications wire.

(continued...)

Finally, the Electric Utilities reiterate that there must be some mechanism for pole owners to determine when an attacher commences using its wires for anything other than "solely to provide cable service." The attacher will obtain this knowledge before anyone else, and it will do so at little or no cost to itself. Being in this position, it should be incumbent upon attachers to provide this information to pole owners. The Commission can create an incentive for attachers to provide this information by creating a presumption that, after February 8, 2001, all attachments to utility poles are used for "providing telecommunications services," and therefore subject to the rental rate established pursuant to Section 224(e), unless the attacher certifies that all of its wires are used solely to provide cable service. To retain the rental rate established pursuant to Section 224(d), each cable attacher should be required by the Commission to make this certification annually on the cable company's FCC Form 325.

B. Wireless "Attachments"

The Electric Utilities set forth at length the reasons why the provisions of Section 224 do not apply to entities providing wireless telecommunications services.⁵⁰ That virtually none of the commenters in this docket discuss this matter, even those with significant wireless interests,⁵¹ indicates that nearly everyone concurs in this assessment. That the exhortations of

49. (...continued)

The only time this would not be the case is if the Commission determines that an attacher who overlashes its own wires should be charged for one attachment. In that circumstance, an attacher who overlashes a wire used "solely to provide cable service" with a wire used for "providing telecommunications services" should pay its one attachment rental at the rate established pursuant to Section 224(e).

50. Reply Comments at 34-37.

51. See AT&T Comments.

a select few of the commenters⁵² or a throwaway line in the NPRM's regulatory flexibility analysis⁵³ suggest otherwise is immaterial. Congress quite simply never intended Section 224 to apply to wireless carriers.⁵⁴

C. Access to Cable Company Conduits

Largely unrecognized in this proceeding, but not forgotten, is that cable companies possess numerous ducts and rights-of-way of their own. While these ducts would be of little use for distribution of electricity, they can be used by other cable companies and telecommunications service providers. A cable company that offers solely cable service should, in some circumstances, be required to provide non-discriminatory access to its conduits and rights-of-way under Section 224. If a cable company holds condemnation or eminent domain powers and utilizes solely private rights-of-way, the cable company should be deemed a utility under the "other public utility" language of Section 224(a)(1),⁵⁵ and as such should be subject to the provisions of Section 224, including, but not limited to, providing non-discriminatory access to its ducts and rights-of-way.⁵⁶

52. Comments of Winstar Communications, Inc.; GTE Comments at 19-21; Comments of Omnipoint Communications, Inc., at 3; Teligent Comments at 9-10.

53. NPRM at para. 61.

54. The Electric Utilities note that for the purpose of this discussion, the attachments referred to include only antennas, transceivers and other similar, "stand-alone" equipment -- the discussion in the text does not encompass wire-line attachments.

55. 47 U.S.C. § 224(a)(1) ("utility" means any person who is a local exchange carrier or an electric, gas, water, steam, *or other public utility* who owns or controls poles, *ducts, conduits, or rights-of-way* used . . . for any wire communications") (emphasis added).

56. The Electric Utilities recognize that cable systems are not subject to regulation as utilities by reason of providing cable service. 47 U.S.C. § 541(c). However, providers of cable television that do not use public rights-of-way are not "cable systems." 47 U.S.C. § 522(7)(A).

(continued...)

Furthermore, even cable companies that are outside the scope of the above discussion may be deemed an "other public utility" once they begin offering telecommunications services. Section 541(c) protects cable systems from being subject to regulation "as a common carrier or utility by reason of their provision of *cable service*."⁵⁷ To the extent such cable systems also begin providing *telecommunications service*, however, their Section 541(c) shield no longer protects them, and they become subject to Section 224 just the same as any other telecommunications service provider public utility.⁵⁸ Just as MCI, AT&T, Sprint, or any other interexchange carrier⁵⁹ that owns or controls poles, conduits, ducts or rights-of-way used for wire communications would have to grant non-discriminatory access to those facilities, so, too, should cable companies providing telecommunications services over such owned or controlled facilities have to provide non-discriminatory access thereto. The plain language of the statute

56. (...continued)

As such, cable television providers that do not use public rights-of-way can not be "cable systems" exempted from being treated as public utilities by Section 541(c).

To the extent that cable television providers have condemnation or eminent domain powers, one of the earmarks of common law public utility status, and to the extent that the protections and privileges accorded to cable television providers distinguishes cable as a service offered indiscriminately to the public or which the public needs, *see, e.g.*, 47 U.S.C. § 224(d), (f), another earmark or common law public utility status, BLACK'S LAW DICTIONARY, 1395 (4th Ed. 1968) (*citing State Public Utils. Comm'n v. Monarch Refrigerating Co.*, 108 N.E. 716 (Ill. 1915); *Southern Oh. Power Co. v. Public Utils. Comm'n*, 143 N.E. 700 (Ohio 1924)), they should be treated as "other public utilities" under Section 224(a) and subject to the provisions of Section 224.

57. 47 C.F.R. 541(c) (*emphasis added*).

58. *See, e.g., Blalock Eddy Ranch v. MCI Telecommunications Corp.*, 982 F.2d 371 (9th Cir. 1992) (discussing MCI's status as a "public utility"); *Hoodkroft Convalescent Center, Inc. v. New Hampshire*, 879 F.2d 968, 974 (1st Cir. 1989) (*citing AT&T Information Sys., Inc. v. FCC*, 854 F.2d 1442, 1444 (D.C. Cir. 1988)) (discussing obligations of "public utilities," such as AT&T, to their ratepayers).

59. This is equally true of local exchange carriers -- incumbent or competitive -- but they are explicitly included the definition of "public utility." 47 U.S.C. § 224(a)(1).

compels such a conclusion, as do equally important notions of unbridled competition and fundamental fair play.

D. Participation in Ride-Outs

Although seemingly ancillary to this proceeding, the Electric Utilities are concerned with facing numerous additional complaints from attachers over time. Increasingly, the Electric Utilities are faced with complaints which arise from, or could have been avoided through, attacher participation in the audit process, make-ready surveys, ride-outs and pole-counts.⁶⁰ The Electric Utilities request that the Commission specifically declare that, if an attacher is given the opportunity to participate in an audit, survey, ride-out, pole-count, system change-out or upgrade, or events such as capacity-testing through rodding out conduits or other means, and the attacher refuses or fails to participate, the attacher should be barred from bringing a complaint related to the activity.⁶¹ The pole attachment process, especially in a competitive environment, will work only with the full participation of all parties, the lack of which should operate as a bar to complaint.

60. See, e.g., *Cable Texas, Inc. v. Entergy Servs., Inc.*, PA 97-006, filed July 9, 1997, wherein the entire dispute, which involves the cost of a pole count and the number of unauthorized attachments, could likely have been avoided through the participation of the cable operator in the ride-out and pole-count process, which it refused to do in contravention to industry practice.

61. Such a policy could also help avoid situations such as that currently developing in Florida, which will undoubtedly become more prevalent as attachers begin to use litigation to block each others' access to poles. See, e.g., *Time Warner Communications v. GTE Media Ventures, Inc.*, Case No. 97-5007-CI-20 (Pinellas County Ct. filed) (Time Warner seeks temporary restraining order to prevent competitor GTE Media Ventures from continuing to attach to Florida Power's poles). The gravamen of the complaint appears to be an allegation that GTE Media Ventures or its subcontractor was moving Time Warner attachments during installation, but Time Warner did not participate in ride-outs prior to installation, although it appears to have followed the installer with a video camera.

E. No Requirement of Uniform or Identical Rates, Terms or Conditions

Some commenters seem wedded to the idea that all of a utility's pole attachment agreements must be identical or, alternatively, that attachers should be able to pick and choose the most favorable provisions from a utility's existing agreements.⁶² This position is untenable. As the Electric Utilities make abundantly clear in its Initial Comments, the keystone of Section 224, particularly after the adoption of the 1996 Act, is negotiated pole attachment rates, terms and conditions.⁶³ There is no role for negotiation, however, where utilities must rotely and mechanistically tender absolutely identical agreements to each of its putative attachers or where putative attachers can simply identify and demand the most favorable provisions from a utility's extant agreements. Such a pole attachment regime would unquestionably fly in the face of the Congressional intent behind the amendments to Section 224.⁶⁴ The Electric Utilities implore the Commission to definitively establish that no such uniformity is required and to explicitly declare its intent to enforce the terms of pole attachment agreements arising from good-faith, arm's-length negotiations.

VII. CONCLUSION

Congress enacted the Telecommunications Act of 1996 generally, and the amendments to Section 224 thereof specifically, to foster a new era of competition in all facets of the

62. See, e.g., Comments of KMC Telecom, Inc., at 4 (*citing* Interconnection Order at para. 1556); Cable Television and Telecommunications Association of New York, Inc., Limited Comments at 2-3; see also Comments of Worldcom, Inc., in Docket 97-98.

63. See 47 U.S.C. § 224(d)(3) (rate prescribed pursuant to Section 224(d) shall apply to cable and telecommunications carriers "*to the extent that such carrier is not a party to a pole attachment agreement*") (emphasis added); see also 47 U.S.C. § 224(e)(1) (rate prescribed pursuant to Section 224(e) shall apply to telecommunications carriers "*where the parties fail to resolve a dispute over such charges*").

64. Accord, Comments of SBC Communications, Inc., at 2-4.